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IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER
v.
ANTONIO J. MORRISON, ET AL.

CHRISTY BRZONKALA, PETITIONER
V.
ANTONIO J. MORRISON, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

1. Whether 42 U.S.C. 13981, the provision of the Violence Against Women Act that creates a private right of action for victims of gender-motivated violence, is a valid exercise of Congress's power to regulate commerce among the several States.

2. Whether 42 U.S.C. § 13981 is a valid exercise of Congress's power under the Enforcement Clause of the Fourteenth Amendment to the Constitution.

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INTEREST OF THE *AMICUS*[1]

The Center for the Original Intent of the Constitution was formed by the Home School Legal Defense Association in 1998, and now operates under the auspices of Patrick Henry College. The Center holds that the interpretation of the Constitution according to the original intent of the founders is the only safe basis for the preservation of limited government and all rights including those important to our association. The Center exists to systematically research and advocate constitutional interpretation according to the principle of original intent.

In our first brief, we argued that principles of *dual sovereignty*, implicit in the structure of the Constitution, prohibited Congress from abrogating state sovereign immunity in state courts. *Alden v. Maine*, 199 S.Ct. 2240 (1999). In our second brief, we argued that dual sovereignty prohibits Congress from directly regulating state governments through the Commerce Clause. *Reno v. Condon*, No. 98-1464 (S. Ct., argued Nov. 10, 1999). In our third brief, we argued that our Founders did not intend to give Congress spending power to usurp sovereign immunity. *George Mason University v.*

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[1] Pursuant to Rule 37.6, this brief was authored, prepared, and paid for in its entirety by the Center for the Original Intent of the Constitution at Patrick Henry College and the Home School Legal Defense Association. No counsel for a party authored any part of this brief, nor did any person or entity other than *amicus curiae*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

The amicus curiae requested and received the written consents of the parties to the filing of this brief. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court. See Sup. Ct. Rule No. 37.3(a).

Litman and United States, No. 99-596 (S. Ct., cert. petition filed Oct. 5, 1999).

Our Founders established a federal government with limited and enumerated powers. The limits on federal power were originally intended to protect the autonomy of the States and the liberties of the people. The Founders viewed vigorous State governments and limited federal government as essential to personal liberty. So do we.

Our interest is to preserve the blessings of liberty for ourselves and our posterity. U.S. Const. Preamble. We seek to do this by holding the federal government to the terms of our original social contract: the Constitution. Faithful adherence to the original intent of the Founders is essential; not because they are ancient and deserve veneration, but because they were the elected representatives of the people. Self-government demands that the intention of the elected Framers should always prevail over the views of unelected judges guided by floating notions of a "living Constitution." Our Founders made promises to the people that ratified the Constitution. Those promises are what is ultimately at stake in this case.

SUMMARY OF THE ARGUMENT

The United States calls 42 U.S.C. § 13981 "classic" civil rights legislation. US Opening Brief, p. 34. The core claim is simple: rape victims cannot count on a fair trial in State courts, so they need a federal forum. Unfortunately, the simplicity of that core issue has been obscured by Congress' compulsive desire to treat everything as "commerce."

Briefs supporting the petitioner draw poignant parallels between the plight of women today and the freed slaves 130 years ago. They remind us that, back then, black victims of violent crime could not get a fair trial in some courts because of local prejudices. They tell us that women cannot get a fair trial in some courts today, because of similar prejudices.

If this is true, why call it commerce? If women cannot get a fair trial in State court, then Congress should be able to provide appropriate federal relief—whether the injustice they suffer costs the nation mere pennies or billions of dollars. If this is really an Equal Protection case, then it should be decided on the basis of Equal Protection law. "Equal justice under law" must never depend on dollar signs.

This law does not regulate interstate commerce as our Founders understood the term. The Commerce Clause—like all the other enumerated powers in Article I, § 8—was drafted to serve one overarching purpose. That purpose was to fulfill the Founders' repeated resolve to empower Congress to legislate on matters the States were "separately incompetent" to handle. Since no individual State can govern commerce between one State and another, the Founders enumerated clear power to do just that. But that clause should *not* be construed to give power to do what the States

can do themselves. While the States are not separately competent to regulate the national economy, they all can—and all do—provide civil remedies for sexual assault.

Giving Congress power to regulate any matter that has a "substantial effect" on the economy is functionally identical to giving Congress a sweeping power to "provide for the general welfare." Virginia (where this case took place) would not have ratified the Constitution if Congress had such power. Patrick Henry and George Mason repeatedly attacked the so-called "sweeping clause" because they feared it gave Congress the power to do *anything*. Virginia ratified the Constitution only because James Madison promised that the power to "provide for the general welfare" was limited to a power to *raise money* to provide for the general welfare.

The Tenth Amendment closes the door on any sweeping power to "provide for the general welfare" under Article I. If Congress has the power to give women a right to sue their attackers in federal court, therefore, that power must have been conferred sometime *after* the Tenth Amendment was adopted. In this case, that power would have to be the Enforcement Clause of the Fourteenth Amendment.

This *amicus* takes no position on whether the Fourteenth Amendment empowered Congress to enact § 13981. Between the Civil War and the ratification of the Fourteenth Amendment, the House of Representatives heard testimony that could certainly lead one to believe they intended to authorize congressional legislation removing cases to federal court. It is not clear whether this legislation was what they would have intended.

It would be tempting to stick to the good old Commerce Clause instead of sailing out on these uncharted waters:

tempting, but wrong. Rape is not commerce. The Violence Against Women Act, 42 U.S.C. §§ 13931 et seq., does not regulate commerce. If it is constitutional, it is constitutional only because it is "appropriate legislation" to enforce equal protection. This Court should reject the Commerce Clause basis for § 13981 and decide this case solely on Enforcement Clause grounds.

ARGUMENT

I.

THE COMMERCE CLAUSE, LIKE EVERY OTHER ENUMERATED POWER, WAS INTENDED TO ENABLE CONGRESS TO LEGISLATE WHERE THE STATES WERE "SEPARATELY INCOMPETENT"

In a recent concurrence Justice Thomas wrote:

> [I]t seems to me that the power to regulate "commerce" can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States. Our Constitution quite properly leaves such matters to the individual States, notwithstanding these activities' effects on interstate commerce. Any interpretation of the Commerce Clause that even suggests that Congress could regulate such matters is in need of reexamination.
>
> In an appropriate case, I believe that we must further reconsider our "substantial effects" test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence.

United States v. Lopez, 514 U.S. 549, 585 (1995).

A. "SEPARATE INCOMPETENCE" DEFINED

This case is the "appropriate case" Justice Thomas was looking for. On the one hand, Congress has assembled mounds of data documenting how much violence against women ultimately costs, in a good-faith effort to prove that it "substantially effects" commerce. This cannot lightly be ignored.

On the other hand, if the words "Power to … regulate … commerce among the several States" really mean the power to make rape a federal tort, then the actual words of the Constitutional text are effectively meaningless. While such a notion may be popular among the "post-modern" philosophical elite, it cannot be the basis for American constitutional law. "We the people" did not ratify this Constitution to create a Court of philosopher-kings. We ratified the Constitution "to secure the blessings of liberty to ourselves and our posterity." U.S. Const. Preamble.

This case highlights the central problem with the "substantially effects" test. Too many things that "substantially effect" the economy really have nothing to do with commerce. Justice Thomas identified marriage, littering, and cruelty to animals. This Court has accepted *certiorari* in *Jones v. United States*, No. 99-5739 (S. Ct., *certiorari* granted Nov. 15, 1999), an arson case involving a private residence. The House of Representatives has passed a "Religious Liberty Protection Act," H.R. 1691, 106th Cong. (1999), that applies in any case where a substantial burden on religious exercise affects commerce among the several States, even if the burden results from a rule of general applicability. H.R. 1691, § 2. Religion, in the aggregate, has a "substantial effect" on the economy—but does this make religion "commerce"?

There is a better standard for interpreting the Commerce Clause than the "substantially effects" test in *Lopez*. That standard looks to the specific resolutions the Framers agreed to *before* they drafted the Commerce Clause—and all the other enumerated powers—at the Constitutional Convention. We call this standard the "separately incompetent" test.

B. "SEPARATE INCOMPETENCE" AGREED TO

Article I, § 8 was originally crafted to achieve one clear goal: to empower Congress to legislate "in all cases to which the separate States are incompetent." That core concept of the legislative power had been agreed to by the Committee of the Whole right at the start of the Constitutional Convention, and it changed very little over the course of their proceedings. A Committee of Detail eventually replaced the original "separately incompetent" language with a list of enumerated powers, but each of those enumerated powers was clearly chosen to achieve the same goal.

It is easiest to identify the coherent principle of "separate incompetence" by tracing the progress of the Constitutional Convention over the whole course of that long hot summer in Philadelphia. The delegates first met in May, 1787. They chose George Washington to preside on the first working day, Friday, May 25, and drew up rules for the convention on Monday the 28th. It was Tuesday, May 26th, before anyone offered substantive proposals for a Constitution. Edmund Randolph, then Governor of Virginia, had the high honor of opening that main business of the Convention. 1 Madison, James, Journal of the Federal Convention (E.H. Scott ed., 1893), 59 [hereinafter, "Madison's Journal"].

Randolph immediately introduced the "Virginia Plan." Section 6 of that plan gave Congress the power "to legislate in all cases to which the separate States are incompetent, or

in which the harmony[2] of the United States may be interrupted by the exercise of individual legislation." 1 Madison's Journal, *supra,* at 62.

After Randolph had finished speaking, Charles Pinckney, of South Carolina, took the floor. Pinckney offered a different proposal. His draft did not confer any broad, general legislative power. It spelled out, instead, a list of 18 enumerated powers. 1 Madison's Journal, *supra*, 67-69. (Sixteen of Pinckney's proposed powers were eventually incorporated into Article I, § 8 of the Constitution.) One of Pinckney's enumerated powers was "To regulate commerce with all nations, and among the several States." 1 Madison's Journal, *supra*, 68.

While Pinckney's list eventually formed the core of our Article I, the Founders adopted and stuck with the Virginia Plan's "separately incompetent" language throughout the entire first phase of the Constitution drafting process. On May 31, just two days after Pinckney's and Randolph's proposals had each been introduced, the Committee of the Whole adopted the "separately incompetent" language of the Virginia Plan. 1 Elliot, Jonathan, Debates on the Federal Convention (2d ed. 1863), 393 [hereinafter, "Elliot's Debates"]. Debate on Pinckney's proposal was postponed.

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[2] Since no individual State, acting alone, can ensure the harmony of the United States, this "harmony" strand is a special case of "separate incompetence" which this Court has often addressed under preemption doctrines. Congress generally has the power to preempt State legislation whenever inconsistent State laws would be disruptive. *See Pennsylvania v. Nelson*, 350 U.S. 497 (1956) which looks to (1) the pervasiveness of the federal regulatory scheme; (2) the federal occupation of the field as necessitated by the need for federal uniformity; and (3) the danger of conflict between state laws and the administration of the federal program.

Two weeks later, the Convention still agreed on the basic principles of the proposed legislative power. On June 13, the Committee of the Whole reported out a full working draft of the Virginia Plan, which continued to use the "separately incompetent" formulation. 1 Elliot's Debates, *supra*, 160-61. The Convention, at this time, was still trying to work out the broad brush strokes of the Constitution, not pencil in the fine details. Edmund Randolph articulated the principle that same day:

> Gov. RANDOLPH observed the difficulty in establishing the powers of the judiciary. The object, however, at present, is to establish this principle, to wit, the security of foreigners where treaties are in their favor, and to preserve the harmony of states and that of the citizens thereof. This being once established, it will be the business of a subcommittee to detail it; and therefore moved to obliterate such parts of the resolve, so as only to establish the principle, to wit: "That the jurisdiction of the national judiciary shall extend to all cases of national revenue, impeachment of national officers, and questions which involve the national peace or harmony." Agreed to unanimously.

1 Elliot's Debates, *supra*, 409.

The Convention followed Randoph's principle of "establishing the principle," leaving the details to a subcommittee. On June 19, the Committee of the Whole again submitted the Virginia Plan, as amended. Thus, after the first month's work, the delegates had not wavered from their original vision of a Congress empowered to "legislate in all cases to

which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." 1 Elliot's Debates, *supra*, 181.

C. "Separate Incompetence" Expanded

This agreement in principle remained unchanged for the next four weeks. It was not until mid-July that this working resolution came under more scrutiny. Though the delegates still agreed in *principle* about the scope of the legislative power, they began to express increasing concern about details. On July 16th, the following colloquoy took place:

> "And moreover to legislate in all cases to which the separate States are incompetent; or in which the harmony of the United States may be interrupted by the exercise of individual legislation," being read for a question,—
>
> Mr. BUTLER calls for some explanation of the extent of this power; particularly of the word incompetent. The vagueness of the terms rendered it impossible for any precise judgment to be formed.
>
> Mr. GORHAM. The vagueness of the terms constitutes the propriety of them. We are now establishing general principles, to be extended hereafter into details, which will be precise and explicit.

1 Madison's Journal, *supra*, 357.

Connecticut's Roger Sherman was not comforted by Mr. Gorham's assurances. Sherman remained unsettled by the

vagueness in Section 6. The next day, July 17, Sherman proposed to replace the "separately incompetent" language with a different definition. He read out his definition, and supplemented it with a list of enumerated powers to explain what his definition meant:

> Mr. SHERMAN observed, that it would be difficult to draw the line between the powers of the General Legislature, and those to be left with the States; that he did not like the definition contained in the Resolution; and proposed, in its place ... to insert "to make laws binding on the people of the United States in all cases which may concern the common interests of the Union; but not to interfere with the government of the individual States in any matters of internal police which respect the government of such States only, and wherein the general welfare of the United States is not concerned."
>
> Mr. WILSON seconded the amendment, as better expressing the general principle.
>
> Mr. GOUVERNEUR MORRIS opposed it. The internal police, as it would be called and understood by the States, ought to be infringed in many cases, as in the case of paper-money, and other tricks by which citizens of other States may be affected.
>
> Mr. SHERMAN, in explanation of his idea, read an enumeration of powers, including the power of levying taxes on trade, but not the power of direct taxation.

1 Madison's Journal, *supra*, 361-62.

The Convention was not ready to replace the "separately incompetent" language with Sherman's new "common interests without interference" formulation. Nevertheless, Sherman had made some headway. Gunning Bedford, Jr., of Delaware, suggested an addition to Randolph's original language:

> Mr. BEDFORD moved that the second member of the sixth Resolution be so altered as to read, "and moreover to legislate *in all cases for the general interests of the Union*, and also in those to which the States are severally incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."

1 Madison's Journal, *supra*, 362 [*emphasis supplied*].

Edmund Randolph, who had shepherded the "separately incompetent" language along this far, was not happy about this addition of a broad "general interests" power. He said:

> Mr. RANDOLPH. This is a formidable idea, indeed. It involves the power of violating all the laws and Constitutions of the States, and of intermeddling with their police. The last member of the sentence is also superfluous, being included in the first.
>
> Mr. BEDFORD. It is not more extensive or formidable than the clause as it stands: no State being separately competent to legislate for the general interest of the Union.

1 Madison's Journal, *supra*, 362.

Virginia, under Randolph's influence, voted against adding the new power, but Bedford's motion to amend passed by a vote of 6 to 4. Though Virginia still did not much care for the new power, that did not keep it from joining with seven other States in agreeing to the now-amended version. Only South Carolina and Georgia opposed it. 1 Madison's Journal, *supra*, 363.

The amended language was broader than Randolph had originally planned, but the proposed legislative power could still be accurately characterized as a power to legislate where the States were "separately incompetent." As Bedford noted, no individual State could really legislate "for the general interests of the Union," even if each State could effectively legislate for its own interests. But the need for detail was now clearer than ever.

D. "Separate Incompetence" In Detail

Although the amended language troubled Randolph, he soon found a way to harmonize it with his original wording. He got appointed to the five-member Committee of Detail. *See* 1 Elliot's Debates, *supra*, 217. On July 26, all of the constitutional proposals that had been adopted to date were referred to this Committee. *Ibid*, at 221. The Committee was also entrusted with Charles Pinckney's original proposal, including his list of enumerated powers of Congress. *Ibid*, at 223.

On Aug. 6, the Committee of Detail reported out the first draft of the Constitution. This committee had replaced all the "separately incompetent" language with a list of specific powers of Congress. The majority of these powers were the very same ones that had originally been proposed by Pinck-

ney. The only power completely left out was the power to to establish a national university.

The first draft of enumerated powers were well received, as far as it went. The Committee of the Whole added "and post roads" to one clause and dropped "and emit bills" from another. 1 Elliot's Debates, *supra*, 245. On Aug. 18th, however, nineteen additional powers were proposed, which were promptly handed off to the very same Committee of Detail. *Ibid*, at 247-48.

One of the proposed powers was to "To grant charters of incorporation in cases where the public good may require them, and the authority of a single state may be incompetent." 1 Elliot's Debates, *supra*, 247. The proposed incorporation power (which was not adopted and which was destined to remain a very controversial topic for years to come) took a broad view of the principle of "separate incompetence" of the individual states. That proposal was rejected.

Other proposals that failed to make the grade were the powers "to establish a university" and "to establish seminaries for the promotion of literature, and the arts and sciences." 1 Elliot's Debates, *supra*, 247. Pinckney had proposed such power at the start, but Randolph's Committee rejected it. When it was sent back to the Committee a second time, it fared no better. A federal university might advance the "general interests" of the United States, but individual States were "separately competent" to handle that.

The powers that *were* added were all powers that no individual State could carry out. Power to pay the debts of the United States was unanimously areed to. 1 Elliot's Debates, *supra*, 258. A power to regulate bankruptcy was added on Aug. 29th (p. 272). Power to admit new States to the Union

was approved on Aug. 30th, as was the power to govern federal territory (p. 275). All of these fit the overall goal of giving Congress power to do what the States could not.

On Sept. 5th, a Committee of Eleven reported out the final proposals for amendments to the legislative power. These included the power to govern what ultimately became the District of Columbia and the Patent and Copyright Clauses. 1 Elliot's Debates, *supra*, 285. Once again, these new powers went beyond what any State could accomplish on its own. (A given State might grant a patent to an inventor, but that patent would obviously be more effective if it applied nationwide.)

By Sept. 12th, every clause in Article 1, § 8 was present in its final form. 1 Elliot's Debates, *supra*, 300-301. (The only significant difference from our present Constitution was that the draft still gave Congress power to appoint a Treasurer, which had been on Pinckney's original list.) Each of the enumerated powers had been selected according to the same overall plan: they were intended to empower Congress to do what the States were "separately incompetent" to do.

E. "Separate Incompetence" Applied

The rule during the drafting process was simple: if the States could do it, Congress could not. If the States could not do it, Congress could. We are no longer drafting a Constitution, however, but applying one that has been written and ratified. The Tenth Amendment closed off the Founders' option of adding new powers whenever Congress ran short.

The rule today, therefore, in light of enumerated legislative powers and an explicit Tenth Amendment, must be as follows: "If the States can do it, Congress usually may not.

If the States can not do it, Congress usually may." Each "usually" is dictated by the doctrine of enumerated powers. Congress usually may not act where the States are separately competent, but if an enumerated power unmistakably authorizes Congress to act, then it can. Likewise, Congress usually may act where the States are separately incompetent to do so, but if no enumerated power reasonably applies, Congress cannot just make one up to fill the need.

The commerce power should be applied in light of this rule. Is Congress regulating commercial transactions that involve more than one State? Since the States are separately unable to regulate such transactions, Congress should be able to do so. Is Congress regulating activity within the conceded jurisdiction and competence of the States? Since the States are separately able to regulate such activity, Congress should *not* be able to do so.

Rape is vile, but it is neither commercial nor interstate. If Virginia is able to provide equal protection for rape victims in State court, then Congress should not be able to step in just because of an alleged aggregate impact on the national economy. If, on the other hand, Virginia is *not* able to provide equal protection for her own citizens but Congress can, then this law should be upheld on Enforcement Clause grounds. Either way, the Commerce Clause should never be the basis for a regulation of rape.

ARGUMENT

II.

A POWER BROAD ENOUGH TO REGULATE RAPE IS A SWEEPING POWER TO "PROVIDE FOR THE GENERAL WELFARE" OR PASS ANY "NECESSARY AND PROPER LAW"

This *amicus* detests rape and all forms of violence against women. A *State* law against rape is necessary, proper, and advances the general welfare of the State. But a *federal* rape law is not constitutional unless it is necessary and proper to carry out some specific enumerated power.

Section 13981 is *not* a regulation of interstate commerce. It would be more honest to admit that it is an attempt to exercise a free-standing power to "provide for the general welfare," or to make all laws which are "necessary and proper." These are the "sweeping clauses" which Patrick Henry feared and James Madison repudiated. This Court has never upheld a bare exercise of the "sweeping clauses," and it should not do so now.

A. "NECESSARY AND PROPER" IS NOT ENOUGH

If Congress had expressly pinned its hopes directly on the Necessary and Proper Clause, this case would be easy to decide. Since *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819), it has been clear that the Necessary and Proper Clause *enhances* the enumerated powers, but does not add a power of its own.

In *McCulloch*, Chief Justice Marshall wrote: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly

adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*, 17 U.S. (4 Wheat), at 421. Marshall's reading of the Necessary and Proper Clause reflects the Framers' stated intention to give Congress power to legislate in "all cases for the general interests of the Union," without rejecting the basic design of *enumerated* powers. Marshall believed in a strong yet *limited* federal government.

Marshall had an expansive view of the Commerce Clause, for his day, but not one that would include the power to regulate rape. In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), Marshall defined commerce as "intercourse," and concluded that Congress had power to regulate "that commerce which concerns more states than one." *Gibbons*, 22 U.S. (9 Wheat.) at 189, 194. Marshall could never have imagined that Congress might try to include *sexual* intercourse within that power.

B. "GENERAL WELFARE" IS NOT ENOUGH

This law cannot be upheld as an exercise of a free-standing power to "provide for the general welfare." That power, as James Madison insisted in the Virginia Ratification Debates, could only be exercised in the context of the whole clause.

> I shall take notice of what the honorable gentleman [Patrick Henry] said with respect to the power to provide for the general welfare. The meaning of this clause has been perverted, to alarm our apprehensions. The whole clause has not been read together. It enables Congress "to lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defence and gen-

> eral welfare of the United States; but all duties, imposts, and excises, shall be uniform throughout the United States." The plain and obvious meaning of this is, that no more duties, taxes, imposts, and excises, shall be laid, than are sufficient to pay the debts, and provide for the common defence and general welfare, of the United States.

3 Elliot's Debates, *supra*, 206.

C. THE "SUBSTANTIAL EFFECTS" TEST CREATES A "SWEEPING CLAUSE"

It is to Congress' credit that it does not try to pretend that this law is a valid exercise of either of these "sweeping clauses." Congress recognizes that neither the Necessary and Proper Clause nor the General Welfare Clause can be the basis for a nationwide rape law. But what is the difference between these "sweeping clauses" and the Commerce Clause, as applied to a non-commercial intrastate sex act solely because of an aggregated, indirect economic effect?

A Commerce Clause that permits federal regulation of any activity, so long as Congress can muster testimony alleging that it "substantially effects" the economy, is just the same old "sweeping clause" that Patrick Henry fought and James Madison repudiated. This Court should therefore reject the "substantially effects" test and replace it with a test that is truer to the text and history of the Commerce Clause. We recommend the "separately incompetent" test that our Founders intended.

ARGUMENT

III.

THIS LAW SHOULD BE UPHELD ON ENFORCEMENT CLAUSE GROUNDS OR NOT AT ALL

If Congress can really regulate rape on the basis of its ultimate effect on the economy, then this Court should just unchain the Necessary and Proper Clause and/or the General Welfare Clause and be done with it. But we believe this Court should decide this case solely on Enforcement Clause grounds.

A. VICTIMS WITHOUT COMMERCE

The "separately incompetent" standard says, "If the States cannot separately accomplish a goal, then Congress usually can." That formulation forces us to consider what goal we are pursuing. Is the goal just to create a civil cause of action for victims of sexual violence? No, the States can do that on their own. Our goal must be to accomplish something the States cannot do themselves. The goal of § 13981 is to ensure the equal protection of the laws. As we shall see, we cannot really achieve that goal by stretching the Commerce Clause.

Commerce cannot really do the job. The commercial impact of rape, according to the legislative record, largely focuses on the effect of rape on a woman's ability to get and keep a job. If sexual violence against women is bad, what about sexual violence against children? That is as bad or worse. Yet sexual violence against women has an economic impact that sexual violence against children apparently lacks. Children who are raped do not cut into the national economy,

because they are not in the work force. This Court should not adopt a Commerce Clause rule that would uphold the Violence Against Women Act but strike down a "Violence Against Children Act" as unconstitutional.

The same logic applies to women who are illegal immigrants. An *amicus* brief that was filed by various immigrant women's groups[3] painted a tragic picture of victimized illegal immigrants who dare not seek legal protection. But illegal immigrants, like minor children, are not *supposed* to be employed in this country. There should be no discernible economic impact from sexual violence against illegal immigrants or underaged children. But a Commerce Clause basis for this law would mean that Congress could not pass a law that protects illegal immigrants and children from sexual violence.

The Fourteenth Amendment was enacted to protect all *persons*, not just adults legally residing within the United States. Congress is trying to protect *persons* here, not commerce. We applaud that goal. If the States *cannot* assure women of a fair trial in their own civil courts, but Congress *can*, then Congress should do so, whether or not it effects commerce. This case should turn on the States' ability to ensure *justice*, not *commerce*.

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[3] Brief of *Amici Curiae* AYUDA, Inc., Asian & Pacific Islander American Health Forum, Asian/Pacific Islander Domestic Violence Resource Project, The National Association of Women Lawyers, Project Esperanza, Refugee Women's Network, Inc., Sakhi For South Asian Women, Sanctuary For Families' Center For Battered Women's Legal Services, S.T.O.P.D.V., Inc., Asian Women's Shelter, Barrier Free Living, Daya Inc., Manavi, New York Asian Women's Center and Saheli in Support of Petitioner.

B. RACE THEN, GENDER NOW

Our "separately incompetent" standard would have been easy to apply in 1867. The freed slaves were being systematically terrorized and the southern States were—to put it charitably—"separately incompetent" to protect them. Major General Thomas J. Wood testified before the House of Representatives on January 28, 1867, about his experiences as Military Commander of the "Department" of Mississisipi:

> Q: Without change in the administration of justice, what, in your judgement, is the prospect of affairs in that state in respect to the future?
>
> A: Taking the whole code of laws of Mississippi, civil and criminal, including the police laws, which discriminate between the white men and black men, and taking the condition of public sentiment with the masses of people, although there are some good people disposed to do justice, I do not think the administration of justice, as the laws are applied, is sufficient to secure the rights of liberty and property and the pursuits of peace to the freed people.
>
> Q: Could you suggest any remedy for these difficulties?
>
> A: Of course, it would be merely a matter of opinion, and perhaps not worth a great deal. The result of my observation in Mississippi led me to the conclusion that there should, by legislation of the government, be established some system by which, when the local courts fail to administer justice, some higher power

> could be brought into play to secure it. Of course, I do not go into details as to any particular plan. If a flagrant outrage is committed, and the local courts fail to take cognizance, or taking cognizance, their decision is flagrantly in violation of justice, there should be some revisionary power, I do not say whether civil or military—that is for the legislature to decide—under which these offenders should be brought to justice.

H. Rep. No. 23, 39th Congress, 2nd Session, pp. 29-31 (1867).

The "separately incompetent" test was easy to apply in 1867, but not very satisfying. Congress did *not* have any enumerated power that it could use to protect the freed slaves from Mississippi's flagrant violation of their rights. That is why the Fourteenth Amendment was adopted. Once it was ratified, on July 9, 1868, the "separately incompetent" test again became easy to apply. Now Congress had the power to do what the southern States, separately, had refused to do.

In this case, a black man is accused of raping a white woman in Virginia. In 1868, such a man would be unlikely to get to the courthouse alive. If he did, he knew what he could expect from a white judge and a white jury. A black rape defendant in Virginia in 1868 would usually have been better off in a federal court.

It is not so clear that he would be better off today. If federal courts are inherently superior to State courts, then he would be. In that case this law would result in the best of all worlds: women victims would be more likely to prevail, while *innocent* black defendants would be more likely to be

acquitted. Every innocent party would be better off (statistically speaking), and every guilty party would be worse off.

C. JUSTICE, NOT COMMERCE

That assumes, however, that federal courts are inherently superior to State courts. While that was true for black men in Virginia's courts in 1868, it is not so obviously true today. Congress's power to provide better justice, if it is available, does not include a power to essentially the same justice in a different court.

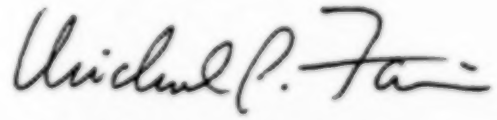
By contrast, a Commerce power that is available any time an activity "substantially affects" the economy does not require any showing that Congress can do a better job than the States can. That is why this case should be decided on Enforcement Clause grounds, not Commerce Clause grounds. Our Founders would want this law upheld if Congress really could accomplish what the individual States could not, but they would want this law struck down if invaded the residuary authority of the States. The Commerce Clause, under the "substantially affects" test, does not distinguish between these situations. The Enforcement Clause should.

When Congress is regulating true interstate commerce, it would be inappropriate for this Court to ask whether it is doing a better job than the individual States might do. But when Congress takes over the job of providing justice for rape victims, that becomes the question that ultimately matters.

CONCLUSION

We take no position on whether this is appropriate legislation under the Enforcement Clause. If Congress really can provide equal justice for black men and white women where the separate States cannot, then our Founders would approve of this law, whether or not it has a "substantial effect" on interstate commerce. This law should therefore stand or fall on Enforcement Clause grounds, not on the basis of the Commerce Clause.

Respectfully Submitted,



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